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No. 95-1079

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GEORGE MEYER,

Petitioner,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, VALLEY SANITATION COMPANY, INC., LAND RECLAMATION COMPANY, and WASTE MANAGEMENT OF WISCONSIN, INC.

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF AMICUS CURIAE, STATES OF NORTH DAKOTA, CALIFORNIA, DELAWARE, FLORIDA, IDAHO, INDIANA, KENTUCKY, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OHIO, TEXAS, AND WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, AND IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI STATES AND SUMMARY OF REASONS TO GRANT WRIT

This Court has long recognized the power of states to provide the traditional local government services – police and fire protection, roads, lighting, traffic control, water, sewage, waste control, and other matters affecting local health and safety. The amici curiae states, through their respective Attorneys General, join in this brief because the decision of the Seventh Circuit Court of Appeals threatens their ability to exercise these local police powers.

The Court of Appeals held that Wisconsin's recycling statute violates the dormant Commerce Clause because it has a "practical impact" on interstate commerce. Virtually every state activity has some impact on interstate commerce. The Court of Appeals' decision invites dormant Commerce Clause challenges to any state law which has a "practical impact" on interstate commerce, no matter how small that impact. This conflicts with the decisions of this Court that recognize states may affect interstate commerce in the exercise of their police powers.

This Court has consistently recognized that the dormant Commerce Clause, like the Supremacy Clause, gives increased deference to states' evenhanded regulatory powers that involve protection of health and safety, natural resources, the environment, and other areas states traditionally regulate. Challenges to such regulations must overcome a strong presumption of validity. Even where commerce is affected, this Court recognizes that states retain broad authority under their police powers to develop effective policies to address particular local concerns.

Both Congress and the states have defined resource recovery, which includes recycling, as a cornerstone of environmental protection. Congress expressly recognizes that waste control and resource recovery should continue to be primarily the function of State, regional, and local agencies. Further, the states have traditionally occupied the resource recovery arena. This Court has recognized resource recovery regulation as an area of legitimate state interest.

The Court of Appeals in this case second-guessed the judgment of the Wisconsin legislature without giving proper deference and consideration to these principles. An evenhanded regulation which arguably affects commerce, such as Wisconsin's recycling statute, should not be summarily invalidated because it may have some "practical impact" on interstate commerce.

Further, this Court must resolve the conflict between circuits concerning whether an evenhanded regulation which has an extraterritorial effect violates the dormant Commerce Clause per se. *Compare* the Court of Appeals' decision in this case with *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995).

The amici states respectfully request that this Court grant Wisconsin's Petition for Writ of Certiorari because (1) the Court of Appeals' decision conflicts with applicable decisions of this Court and (2) this Court must settle the conflict between circuits concerning whether an evenhanded regulation which has an extraterritorial effect violates the dormant Commerce Clause per se.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH BOTH RECENT AND LONG-STANDING DECISIONS OF THIS COURT PROTECTING THE RIGHT OF STATES TO REGULATE LOCAL CONCERNS, SUCH AS RECYCLING, WHEN SUCH REGULATIONS ARE NON-ECONOMIC AND PROTECT LOCAL HEALTH AND SAFETY, NATURAL RESOURCES, OR THE ENVIRONMENT.

"Virtually every state activity, like virtually every activity of a private individual, arguably 'affects' interstate commerce." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 582 (1985) (O'Connor, J., dissenting). Yet in this case, the Court of Appeals determined the Wisconsin recycling statute violates the dormant Commerce Clause because it has a "practical impact" on "economic activity completely outside the State." PETITIONER'S APPENDIX, p. 11. Under the Court of Appeals' analysis, any statute or regulation which has a practical impact, no matter how small, on economic activity completely outside the state will constitute a per se violation of the dormant Commerce Clause. PETITIONER'S APPENDIX, pp. 11-23. This conflicts with a long line of decisions of this Court recognizing that "in the exercise of a necessary power" states "may affect" interstate commerce. *See, e.g., St. Louis-S.F. Ry. v. Public S.C.*, 261 U.S. 369, 371 (1923).

a. STATES MAY LOSE THE ABILITY TO IMPLEMENT EFFECTIVE HEALTH AND SAFETY REGULATIONS.

This Court has long distinguished between economic protectionism, on the one hand, and health and safety regulation, on the other. *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 365-66 (1992); *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956 (1982); *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533 (1949). From its earliest decisions, this Court recognized the regulatory authority of a state is greatest in matters affecting the "health" of its citizens. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 250 (1829) (holding Delaware could safeguard the health of its citizens by draining a marshy creek which was an interstate waterway even though such action blocked federally licensed boating); *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824). *Compare U.S. v. Lopez*, 115 S. Ct. 1624, 1647 (1995) (Thomas, J., concurring) (long recognized validity of "state inspection, quarantine, and health laws" even when they have "substantial effects" on interstate commerce).

In addition, this Court gives great deference to states' regulatory powers when they involve matters of local concern such as regulation of the environment and natural resources. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670 (1981). *See Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 287 (1977) (Rehnquist, J., concurring); *Baldwin v. Seelig*, 294 U.S. 511, 525 (1935). This Court has upheld a variety of regulations designed to conserve and maintain the collective natural resources of the state. *See Sporhase*, 458 U.S. at 956 (upholding three of four groundwater

protection regulations); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (resource recovery); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (resource recovery); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (local air quality); *Wyoming v. Colorado*, 353 U.S. 953 (1957) (apportionment of surface water); *Geer v. Connecticut*, 161 U.S. 519 (1896) (wildlife protection); *Smith v. Maryland*, 59 U.S. 71 (1855) (fisheries protection).

The district court in this case found Wisconsin's recycling statute protected health and safety by reducing the risk of environmental contamination. PETITIONER'S APPENDIX, p. 46. Legislative measures enacted to promote health and safety are accorded particular deference. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 443 (1978); *H.P. Hood*, 336 U.S. at 533. Challenges to state public safety regulations must overcome a "strong presumption of their validity." *Raymond Motor*, 434 U.S. at 444. Courts will not second-guess legislative judgments about the importance of health and safety in comparison to the burdens on interstate commerce. *Kassel*, 450 U.S. at 670. States are not required to convince courts of the correctness of their legislative judgments. *Clover Leaf*, 449 U.S. at 464. Rather, those challenging the legislative judgment must convince the court that the government decisionmaker could not reasonably conceive the legislative facts on which the judgment is based are true. *Id.*; *Vance v. Bradley*, 440 U.S. 93, 111 (1979). *See also Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952); *Henderson Co. v. Thompson*, 300 U.S. 258, 264-265 (1937). In this case, the Court of Appeals second-guessed the judgment of the

Wisconsin legislature and the district court without giving proper deference and consideration to these principles.

States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). *See Clover Leaf*, 449 U.S. at 463-469, 473. The power of states to shelter their people from menaces to health or safety, even when those dangers emanate from interstate commerce, is deeply rooted in both history and law. *H.P. Hood*, 336 U.S. at 533. Although this Court consistently has rebuffed states' attempts to advance their own commercial interests by curtailing the movement of articles of commerce, this Court generally has supported states' rights to impose even burdensome regulations in the interest of local health and safety. *Id.* at 533-35.

Congress recognizes that states bear the primary responsibility for waste control and resource recovery:

> The Congress finds with respect to solid waste –
>
> . . . .
>
> (4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for

> proper and economical solid waste disposal practices.

42 U.S.C. § 6901(a)(4).

Further, Congress determined that improper management and disposal of solid and hazardous waste is a threat to human health and the environment. 42 U.S.C. § 6901(b)(2). Congress identified a specific need to recycle used oil to conserve resources and protect public health. 42 U.S.C. § 6901a. Congress also established the objectives of assisting the states to develop resource recovery programs and to minimize generation and disposal of hazardous waste. 42 U.S.C. § 6901(a)(1), (6), (7), & (11).

The Environmental Protection Agency defines resource recovery as a key element in achieving environmental goals by reducing or eliminating sources of contamination. 57 Fed. Reg. 37,194 at 37,195 (1992) (codified at 40 CFR Part 148 et seq.). At certain levels the toxic constituents of certain recyclables become regulated as hazardous waste under the Resource Conservation and Recovery Act (RCRA) through individual hazardous waste programs as delegated to the states. 42 U.S.C. §§ 6901-6992K. Even below these levels, many states regulate accumulations of these constituents in the environment through disposal or incineration because such accumulations have adverse impacts.[1]

---

[1] Data for table prepared by North Dakota State Health Department.

RECYCLABLE	POTENTIAL TOXICITY	FEDERAL REGULATORY AUTHORITY
Lead-acid batteries	lead and sulfuric acid	40 CFR Part 261
Other batteries	cadmium and mercury	40 CFR Part 261
Waste oil	lead, cadmium, chrome, trace amounts of solvents	40 CFR Part 261
Paint and solvents	toxicity and ignitability	40 CFR Part 261
Electronic appliances	lead, solder and mercury	40 CFR Part 261
Refrigeration-type appliances	chlorofluorocarbons (CFCs)	Sec. 608 Federal Clean Air Act
Fluorescent lighting tubes	mercury and lead	40 CFR Part 261
Plastics	lead, cadmium, incinerator ash	40 CFR Part 261
Tire stockpiles	rats, snakes, mosquito breeding, and toxic emissions from inherently unstoppable fires	
Antifreeze	ethylene glycol	

This Court has recognized states' abilities to consider individual constituents of waste. In *Fort Gratiot*, 504 U.S. at 366, the Court noted that its holding would have been different if imported waste raised health or other concerns not presented by the receiving state's waste. States have attempted to define whether imported waste raises health or other concerns not presented by their own waste. North Dakota, for example, requires waste generators who store or dispose of such waste in North Dakota to effectively characterize their waste. N.D.C.C. § 23-29-07.8. This characterization requirement is substantially less than the characterization requirements for in-state waste. N.D. Admin. Code §§ 33-20-01.1-03, 04, 06, 07, 08, 09, 11; 33-20-03.1-02(6)(b) & (g) and (7)(b); 33-20-04.1-03(1)(a) and (1)(h). The decision of the Court of Appeals, if allowed to stand, will prevent statutes like North Dakota's waste characterization law from having any impact on interstate commerce. PETITIONER'S APPENDIX, pp. 11-23. Yet, if the waste is not characterized, there is no way of determining whether it raises health or other concerns not presented by the receiving state's waste. This is but one example of the Catch-22 position in which states are placed under the Court of Appeals' decision.

In its brief before the Court of Appeals, the National Solid Waste Management Association (NSWMA) indicated Wisconsin could accomplish its purposes through the alternative method of requiring out-of-state waste generators to follow the Wisconsin recycling program. NSWMA said the state could demand production of relevant records and inspect out-of-state generators to verify

compliance. Under NSWMA's alternative regulation, Wisconsin could even recover additional costs for its inspection and monitoring program. NSWMA's Appellant Brief before the Seventh Circuit Court of Appeals, p. 34. Yet, even NSWMA's alternative method cannot be implemented without having some "practical impact" on interstate commerce.

To protect surface water, ground water, air quality, fish and wildlife, soil resources, nonrenewable resources, and the health and safety of their citizens, states must be able to exercise their police powers effectively to provide traditional local government services. The Court of Appeal's holding prevents states from doing so whenever a state statute has a "practical impact" on "economic activity completely outside the State." PETITIONER'S APPENDIX, p. 11. As such, it is in direct conflict with this Court's previous decisions, the will of Congress, the Environmental Protection Agency, and state laws implementing effective solid waste management programs.

b. CONTRARY TO THE DECISIONS OF THIS COURT, THE COURT OF APPEALS CONCLUDED THAT ANY "PRACTICAL IMPACT" ON "ECONOMIC ACTIVITY COMPLETELY OUTSIDE THE STATE" VIOLATES THE DORMANT COMMERCE CLAUSE PER SE.

Previous decisions of this Court that invalidated state laws because of their extraterritorial effect have all involved discriminatory economic regulations of integrated interstate markets that either directly regulated commerce beyond that state's boundaries or had the practical effect of regulating commerce beyond that

state's boundaries. *See Healy v. Beer Institute*, 491 U.S. 324 (1989) (regulation of out-of-state wholesale liquor prices in interstate commerce); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (regulation of out-of-state securities transactions in interstate commerce); *Baldwin*, 294 U.S. at 522-24 (regulation of out-of-state milk prices in interstate commerce); *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (regulation of out-of-state wholesale electricity prices in interstate commerce); *Missouri ex rel. Barrett v. Kansas Nat. Gas Co.*, 265 U.S. 298 (1924) (regulation of out-of-state wholesale natural gas prices).

However, "[n]ot every exercise of state power with some impact on interstate commerce is invalid." *Edgar*, 457 U.S. at 640 (*citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and *Huron Portland Cement*, 362 U.S. at 443). This Court consistently protects the rights of states to enact and enforce evenhanded non-economic regulations that effectuate a legitimate local public interest and only incidentally affect interstate commerce unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Id.*; *Clover Leaf*, 449 U.S. at 470-75. This Court strikes down Congressional acts which invade these areas of legitimate local control if the law does not involve matters which substantially affect interstate commerce, or if it requires states to regulate matters of national concern which Congress could regulate directly. *Lopez*, 115 S. Ct. at 1626-30 (involving a criminal law that did not substantially affect interstate commerce); *New York v. U.S.*, 505 U.S. 144, 178 (1992) (holding the Constitution does not give Congress authority to require states to regulate).

Further, even when a state law discriminates against interstate commerce, the law is still valid if it serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means. *Maine*, 477 U.S. at 140; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). *See also Oregon Waste Systems v. Department of Env. Quality*, 114 S. Ct. 1345, 1351 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 348 (1992); *Fort Gratiot*, 504 U.S. at 366.

In this case, the Court of Appeals jumped directly to analysis of whether the Wisconsin law had practical impact on economic activity completely outside the state under the *Healy* line of cases without first determining whether the Wisconsin law is an evenhanded non-economic law which only incidentally affects interstate commerce. PETITIONER'S APPENDIX, p. 11. This turns dormant Commerce Clause law on its head. The first step in analyzing any law subject to judicial scrutiny under the dormant Commerce Clause is to determine whether it regulates "evenhandedly" with only "incidental" effects on interstate commerce, or whether it "discriminates" against interstate commerce. *Oregon Waste*, 114 S. Ct. at 1350. *Philadelphia* makes clear that the balancing test from *Pike* is to be used when non-discriminatory legislative objectives "are credibly advanced and there is no patent discrimination against interstate trade." 437 U.S. at 624. It is the Court of Appeals' upside-down analysis that causes the amici states to ask this Court to grant the Petition for Writ of Certiorari. Contrary to the applicable decisions of this Court, the Court of Appeals' analysis leads to the

conclusion that any "practical impact" on economic activity outside the state violates the dormant Commerce Clause per se.

The district court, on the other hand, began its analysis where *Oregon Waste* requires it to – by determining whether the statute is evenhanded or discriminatory. PETITIONER'S APPENDIX, p. 30. The district court determined that most of the Wisconsin recycling law is not discriminatory, *id.* at 30-37, and invalidated those portions of the law that were discriminatory (because they treated out-of-state municipalities different than in-state municipalities), *id.* at 37-39. The district court then proceeded to make many specific findings of fact in relation to the portion of Wisconsin's recycling law that is evenhanded. *Id.* at 43-47.

The amici states' critical concern is the Court of Appeals' failure to distinguish between discriminatory economic regulations that result in economic protectionism, on the one hand, and evenhanded non-economic regulations that protect health, safety, the environment, and other legitimate local public interests, on the other. *See, e.g., Fort Gratiot*, 504 U.S. at 365-66. The amici states respectfully ask this Court to grant the Petition because the Court of Appeals' decision conflicts with the decisions of this Court by making any impact on interstate commerce a per se violation of the dormant Commerce Clause.

c. THE COURT OF APPEALS' DECISION NULLIFIES STATE REGULATION BASED ON THE PRECEPTS OF FEDERALISM.

Federalism allows states to develop effective regulations that address legitimate local public interests. *Seacoast Products*, 431 U.S. at 266. This is particularly true when the local need involves an area of historical state regulation without federal preemption. *Id.*

This Court has recognized consistently that the dormant Commerce Clause, like the Supremacy Clause, gives increased deference to state regulatory powers involving protection of health and safety, natural resources, the environment, and other areas traditionally regulated by the states. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 86, 87-94 (1987). When Congress regulates in an area that is historically within the states' police powers, the party arguing preemption must overcome the strong presumption that Congress does not intend to displace state law. *Pacific Gas & Elec. v. State Energy Resources Comm'n*, 461 U.S. 190, 206 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). No less deference should be paid to police powers historically exercised by the states when Congress has not acted.

Health and safety regulations carry a strong presumption of validity when challenged in court. *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R. I. & P. R. Co.*, 393 U.S. 129, 138-39, 142 (1968); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959). If there are alternative ways of solving a problem, this Court does

not determine which of those ways is best suited to achieving a valid state objective. *Brotherhood*, 393 U.S. at 138-139; *Bibb*, 359 U.S. at 524. Policy decisions are for state legislatures to make absent federal entry into the field. *Brotherhood*, 393 U.S. at 138-139; *Bibb*, 359 U.S. at 524.

This is particularly true when the regulation must be innovative to address distinct local concerns. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980). States must be allowed to structure relations between their citizens and fashion effective and creative programs to solve local problems. *Id.* Because of a healthy regard for federalism and good government, this Court has been reluctant to step into areas historically subject to state police powers. *Id.*

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

Reeves, 447 U.S. at 437.

This Court recognizes that the Framers of the Constitution never intended to cut the states off from legislating on subjects relating to the health, life, and safety of their citizens, even though the legislation might indirectly affect commerce. *Huron Portland Cement*, 362 U.S. at 442-44. Legislation may affect commerce and persons

engaged in commerce without constituting a regulation of commerce within the meaning of the Constitution. *Id.* (*citing Collins v. American Buslines, Inc.*, 350 U.S. 528 (1956) (state worker's compensation act applies to an employee killed in interstate commerce where federal government had not occupied field); *Boston & M.R.R. v. Armburg*, 285 U.S. 234 (1932) (state worker's compensation act applicable to employees engaged exclusively in intrastate commerce); *Simpson v. Shepard*, 230 U.S. 352 (1913) (enforcement of intrastate rates on interstate commerce); *Louisville & Nashville R. Co. v. Kentucky*, 183 U.S. 503 (1902) (conviction of railroad company for charging unlawful rates); *Austin v. Tennessee*, 179 U.S. 343 (1900) (criminal conviction for sale of tobacco); *Sherlock v. Alling*, 93 U.S. 99 (1876) (liability in tort absent Congressional action)).

This Court recently expressed its strong concern to preserve the "distinction between what is truly national and what is truly local." *Lopez*, 115 S. Ct. at 1634. These distinctions preserve the balance between federal, state, and local authority intended under our "federalist" system. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971); *Lopez*, 115 S. Ct. at 1634-42 (Kennedy, J., concurring). The importance of clarifying federalism's role in states' resolution of local problems is an additional reason to grant Wisconsin's Petition for Writ of Certiorari.

However, the Court of Appeals' analysis erroneously equates a "practical impact" on "economic activity completely outside the state" with a per se violation of the dormant Commerce Clause under the *Healy* line of cases. The Court of Appeals' decision invites dormant Commerce Clause challenges to any state law which has a

"practical impact," no matter how small, on interstate commerce. This threatens the validity of any state law that impacts interstate commerce – from state vehicle emission standards enacted under the Clean Air Act, to inspection laws which protect state resources from pests and disease; from recycling laws such as bottle bills which further federally enacted goals such as those set forth in RCRA and the federal Pollution Prevention Act of 1990, to waste characterization statutes that follow the principles outlined in *Fort Gratiot*.

Waste control and resource recovery are among those services that are "local" by their very nature – as are police and fire protection, roads, lighting, traffic control, water, and sewage. *Compare Garcia*, 469 U.S. at 578 (Powell, J., dissenting). "Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government." *Id.* at 575. It is functions such as these for which local governments were created and which local governments perform best. *Id.* at 576. State and local officials must be intimately familiar with these services and sensitive to their quality as well as cost. *Id.* at 578. If state and local governments are not allowed to develop innovative and cost effective waste control and resource recovery laws, waste control and resource recovery simply will not happen. *See* district court's findings of fact, PETITIONER'S APPENDIX, p. 46 (determining that "inspection and reporting" were "likely to be ineffective" and impose "a substantially greater cost upon Wisconsin and its landfill consumers than the existing recycling program requirements").

The amici states respectfully request that this Court grant Wisconsin's Petition for Writ of Certiorari because the Court of Appeals' decision conflicts with the applicable decisions of this Court discussed above and raises important questions of federal law that can only be resolved by this Court.

2. THIS COURT MUST SETTLE THE CONFLICT BETWEEN CIRCUITS CONCERNING WHETHER AN EVENHANDED REGULATION WHICH HAS AN EXTRATERRITORIAL EFFECT VIOLATES THE DORMANT COMMERCE CLAUSE PER SE.

In *Cotto Waxo Co. v. Williams*, 46 F.3d 790 (8th Cir. 1995), the Eighth Circuit Court of Appeals determined that an evenhanded non-economic regulation which had only an incidental effect on interstate commerce did not violate the dormant Commerce Clause. In this case, the district court determined that most of Wisconsin's recycling statute was an evenhanded regulation that only incidentally affected interstate commerce, striking those portions of the law that were discriminatory. PETITIONER'S APPENDIX, pp. 30-44. Without overturning the legal and factual conclusions of the district court, the Court of Appeals determined that Wisconsin's recycling statute violated the dormant Commerce Clause per se because it has a "practical impact" on interstate commerce. *Id.* at 11-23.

The amici states respectfully request that this Court resolve this conflict between circuits concerning whether

an evenhanded regulation which has an extraterritorial effect violates the dormant Commerce Clause per se.

CONCLUSION

For the reasons stated above, the amici states respectfully request that this Court grant Wisconsin's Petition for Writ of Certiorari.

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